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No. 371

In the Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

PHILCO CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR THE UNITED STATES

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Washington 25, D. C.

INDEX

CITATIONS

Cases: Page

Associated Industries v. *Ickes*, 134 F. 2d 694, vacated as moot, 320 U. S. 707 2, 7, 8

Federal Communications Commission v. *National Broadcasting Co. (KOA)*, 319 U. S. 239 8, 9

Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U. S. 470 1, 3, 8

Federal Communications Commission v. *WJR, The Goodwill Station*, 337 U. S. 265 7

Granik v. *Federal Communications Commission*, 234 F. 2d 682 10

Metropolitan Television Co. v. *Federal Communications Commission*, 221 F. 2d 879 8

National Broadcasting Corporation v. *Federal Communications Commission*, 132 F. 2d 545, affirmed, 319 U. S. 239 3, 9

National Coal Ass'n v. *Federal Power Commission*, 191 F. 2d 162 5

Ohio Valley Broadcasting Corp., 10 Pike & Fischer, Radio Regulation 152, affirmed *sub nom.* Clarksburg Publishing Co. v. Federal Communications Commission, 225 F. 2d 511 11

Reade v. *Ewing*, 205 F. 2d 630 2, 8

Scripps-Howard Radio v. *Federal Communications Commission*, 316 U. S. 4 7

United States Cane Sugar Refiners' Ass'n v. *McNutt*, 138 F. 2d 116 9, 12

United States ex rel. Chapman v. *Federal Power Commission*, 345 U. S. 153 2

Statutes:

Communications Act of 1934, 48 Stat. 1064, as amended:

Sec. 309 (c) (47 U. S. C. (Supp. V) 309 (c)) 3, 5, 6, 7, 9, 10, 11

Sec. 402 (b) (6) (47 U. S. C. 402 (b) (6)) 3, 5

Radio Act of 1927, Sec. 16, 44 Stat. 1169 3

Radio Act of 1927, Sec. 16, as amended by the Act of July 1, 1930, 46 Stat. 844 3

Miscellaneous: Page

H. Rept. No. 404, 69th Cong., 1st Sess. 3
S. Rept. No. 44, 82nd Cong., 1st Sess. 3, 7-8, 9
67 Cong. Rec. 5485 3
72 Cong. Rec. 8052, 11530 3
Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955) 2, 8

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MEMORANDUM FOR THE UNITED STATES

Pursuant to the Court's invitation of November 10, 1958, there is attached hereto a statement of the Federal Communications Commission setting forth its views in this case. It is the Commission's conclusion, set forth in its Statement, that the Court of Appeals has misconceived the statutory scheme and that the decision creates a precedent which can have a disruptive effect upon the Commission's administration of the Communications Act.

The view of the United States is that the decision of the Court of Appeals is correct. It is, of course, clear

under the decisions in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, and successor cases that, under a statute which gives standing to those "interested," "aggrieved" or "adversely affected," a person may qualify even though his legal rights, in a strict sense, would not be violated by contemplated administrative action. Under such enactments, the ordinary test for determining whether a would-be intervenor has standing is a common-sense one: Whether, as a practical matter, he has a real and substantial, rather than a frivolous or insignificant, basis for asserting that his interests would be harmed by the proposed agency action. See, generally, Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955). The Court of Appeals subscribed to that standard (Pet. 5a). Moreover, we believe that its application of the standard to the particular facts of this case cannot be said to be unreasonable.

The trend of decisions has been to give a reasonably liberal construction to phrases such as "parties in interest" and "persons aggrieved or affected" when used in statutes which confer standing to participate in administrative proceedings and to seek review of administrative orders. See, *e. g.*, *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U. S. 153; *Reade* v. *Ewing*, 205 F. 2d 630 (C. A. 2); *National Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462 (C.A.D.C.); *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2). Since the Federal Communications Commission, in the absence of objection, may take final administrative action au-

thorizing construction of a broadcasting facility without conducting a hearing, hospitable consideration of a claim of standing serves the public interest, in our view, because it enables the agency and the reviewing court to consider and weigh substantial factual or legal objections which otherwise might not be presented and developed.* This is not, of

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* Under the Radio Act of 1927, the immediate predecessor of the Communications Act of 1934, the right of appeal in licensing cases was originally restricted to unsuccessful applicants and to licensees whose authority was ordered revoked. Section 16, 44 Stat. 1169. A minority report filed by Congressman Davis of Tennessee (H. Rept. No. 404, 69 Cong., 1st Sess., pp. 6-21) had unsuccessfully urged that appeal rights should be broader and extend to any person "aggrieved." See, also, Congressman Davis' remarks on the floor that appeal rights ought to be granted to any person "interested in, aggrieved, or in any way affected or inconvenienced by" any licensing decision. 67 Cong. Rec. 5485.

In 1930, Section 16 was amended (46 Stat. 811) to give a right of review in licensing cases to any applicant, any licensee, or "any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission * * *." Congressman Davis, who was one of the managers of the House bill incorporating this amendment, stated that the 1927 provision had not proved sufficiently "comprehensive"; that the new bill aimed to "insure any interested party the right to be heard"; and that the new bill expressed the views which he had urged several years previously when the same issue of standing had been before the 69th Congress. 72 Cong. Rec. 8052, 11530. Without material change, Section 16 of the Radio Act, as amended in 1930, became Section 402(b) of the Communications Act of 1934 (the section which came before this Court in the *Sanders* case).

In changing protest procedures in 1952 (see Section 309 (c), 47 U. S. C. 309(c)), Congress, it seems clear, intended to leave the law of standing unchanged. It indicated that

course, to say—and the Court of Appeals does not suggest—that an interest which is merely "remote and insubstantial" (*National Broadcasting Corporation* v. *Federal Communications Commission*, 132 F. 2d 545, 548 (C.A. D.C.), affirmed, 319 U. S. 239), would suffice to confer standing. The question of standing thus depends, in final analysis, upon an evaluation of the particular facts.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

DECEMBER 1958

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the courts would draw the line, as they had in the past, in determining when one who claimed an interest had a "legitimate interest." S. Rept. No. 11, 82d Cong., 1st Sess., p. 8.

STATEMENT OF THE FEDERAL COMMUNICATIONS COMMISSION

The holding of the Court of Appeals (Pet. App. A) that, where a Commission broadcast licensee uses licensed facilities to provide various kinds of "advertising" for another business in which its parent corporation is engaged, any competitor of the parent corporation has standing to protest the renewal of the relevant license under Section 309(c) of the Communications Act (47 U.S.C. §309(c)) and to appeal any adverse determination of that protest under Section 402(b)(6) of the Act (47 U.S.C. §402(b)(6)), raises problems of concern to the Commission. This memorandum sets forth the Commission's views on the serious jurisdictional problem involved and on the practical difficulties which confront the Commission in its administration of the Communications Act as a result of the Court of Appeals' interpretation of the statute.

Both in its decision dismissing the Philco Corporation's protest of the renewal of the National Broadcasting Company's licenses to operate a radio and a television broadcast station in Philadelphia and in the court below the Commission took the position that no likelihood of substantial injury to Philco as a result of the renewal had been shown and that standing to protest or to appeal was therefore absent. The alleged injury flowing from various network activities of the National Broadcasting Company (NBC) (upon which the majority in the Court of Appeals did not pass) was, in the Commission's view, wholly irrelevant to the license renewal which Philco protested.

The injury allegedly resulting from those NBC station activities which provide some "advertising" for its parent corporation, the Radio Corporation of America (RCA), was, the Commission thought, too vague and insubstantial to form a basis for standing. If this case involved nothing more than a difference in judgment on certain unique factual details between the majority of the court below and the Commission, there might be little cause for concern. The problem, however, goes much deeper.

A "party in interest" under Section 309(c) of the Act has substantial procedural rights. Where the Commission grants any authorization without hearing, such a party may force the holding of a hearing if he alleges with particularity facts which, if true, show that the grant was improperly made or would otherwise not be in the public interest. The hearing and determination of any such case must be expedited, and the effectiveness of the grant involved must be postponed, pending hearing and decision, unless the authorization is necessary to the maintenance of an existing service or the Commission affirmatively finds, for reasons set forth in its decision, that the public interest "requires" that the grant remain in effect.

The very significant procedural role which such parties in interest are thus authorized to play in the Commission's administration of its licensing functions under the Communications Act must be obvious. Section 309(c), moreover, introduces the concept of the "private attorney general," which originally appeared in the field of appellate review of ad-

ministrative decisions, into the heart of the administrative process, and the facts which confer standing to enact that role upon any person need bear no relationship to the merits of the Commission action which he is empowered to affect so substantially. Indiscriminate extension of standing to force a hearing under Section 309(c) can thus have a grave effect upon the Commission's ability to control its docket and allocate its energies and attention to the problems whose merits are most deserving. Cf. *Federal Communications Commission* v. *WJR, The Goodwill Station*, 337 U.S. 265, 282-283.

Clearly Congress did not contemplate an unlimited class of "private attorneys general" insofar as the protest procedure was concerned. When Section 309 (c) was enacted, the Senate Report on the relevant bill stated (S. Rept. No. 44, 82nd Cong., 1st Sess., p. 8):

> Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The committee does not so construe the term 'party in interest'; 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the

Federal Communications Commission v. *Sanders Radio Station*, 309 U.S. 470; *Associated Industries* v. [illegible], 131 F.2d 691 (C.A. 2), vacated as moot, 320 U.S. 707.

Scripps Howard Radio v. *Federal Communications Commission*, 316 U.S. 4, 14.

> KOA case (319 U.S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders case (309 U.S. 470).

Standing under the *KOA* case (*Federal Communications Commission v. National Broadcasting Co. (KOA)*, 319 U.S. 239) is clearly limited to those who hold licenses from the Commission and whose radio signal suffers interference within the contours protected under the Commission's rules as a result of a Commission order authorizing another radio operation. The *Sanders* decision (*Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470), on the other hand, presents an instance in which a broadcast licensee was held to have standing to appeal from a Commission order authorizing the entry of a new competing station in the same market, because of the likelihood that the licensee of the existing station would be financially injured by the new competition.

Various lower courts have read the *Sanders* decision as conferring standing to appeal, under ordinary statutory provisions, wherever there is a likelihood of some injury as a result of the administrative action of which review is sought. See, *e.g.*, *Associated Industries* v. *Ickes*, 134 F.2d 694 (C.A. 2), *vacated as moot*, 320 U.S. 707; *Reade v. Ewing*, 205 F.2d 630 (C.A. 2); *Metropolitan Television Co.* v. *Federal Communications Commission*, 221 F.2d 879. See also Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353 (1955). On the other hand, the re-

quirement, suggested by Judge (later Justice) Rutledge, that " * * * there be probable injury of a substantial character" (*National Broadcasting Corporation (KOA)* v. *Federal Communications Commission*, (C.A. D.C.), 132 F.2d 545, 548, *affirmed*, 319 U.S. 239) is generally accepted, as is the requirement that " * * * the class of petitioners who have 'standing to sue' be confined to those who can show some direct adverse effect traceable with reasonable certainty to the regulations promulgated." *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F.2d 116, 120 (C.A. 2). And Justice Douglas, dissenting in *Federal Communications Commission* v. *National Broadcasting Co. (KOA)*, *supra*, 319 U.S. 239, 265, has argued that unless standing to appeal is limited to those whose interest in the administrative matter involved is substantial and immediate the constitutional requirement of case or controversy will be violated.

Whatever the limitations which should be imposed upon standing to appeal, however, the Senate Report quoted above makes it clear that Congress conceived of standing to protest under Section 309(c), upon grounds of economic injury, as limited to cases where the likelihood of substantial injury due to Commission action was at least as clear, obvious and substantially incontestable as it was in the *Sanders* case. If there were any doubt that Congress intended standing to protest based on allegations of economic injury to be limited to cases of obvious and largely incontestable likelihood of such injury, that doubt would be resolved, in the Commission's view, by the fact

that Section 309(c) makes the question of whether one who protests a Commission grant is properly a "party in interest" a threshold issue, which the Commission must normally, and perhaps always, determine within thirty days of the filing of the protest on the basis of pleadings.[3] Since no substantial purpose could be served by long and complex hearings upon an issue which need bear no relation to the merits of any Commission action, this provision of the statute is easily understandable. Its effect, however, is to rule out, at least as a matter of normal practice, claims of standing as a "private attorney general" which rest on allegations of injury, the likelihood and substantiality of which cannot be demonstrated on the pleadings.[4] Clearly the statute is

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[3] "Any protest so filed * * * shall contain such allegations of fact as will show the protestant to be a party in interest. * * * The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant * * *." Communications Act, Section 309(c), as amended. It is conceivable, though in the Commission's view unlikely, that this language might allow a preliminary hearing upon standing issues alone in certain exceptional cases. It is clear that the section does not contemplate such hearings as a normal practice.

[4] It is to be noted that such reasoning would not apply to a case where standing is claimed, not as a "private attorney general", but rather on grounds which are identical with the reasons urged for setting aside the grant on the merits. In such a case, the statute clearly contemplates the designation of such issues for hearing. Cf., *Granik* v. *Federal Communications Commission*, 234 F.2d 682.

designed, insofar as this aspect of the protest procedure is concerned, to avoid the necessity for judgments based upon conjecture or surmise.

The holding of the court below, however, was necessarily based on just such a judgment.[5] Without attempting to delineate all the situations in which the probability of substantial injury as a result of Commission action would be so demonstrable as to support a claim of standing, it is clear that beyond the sphere of the particular industry regulated and its competitors, consumers and suppliers,[6] the effects of any Commission action become increasingly difficult to predict. Here, for example, it is indisputable that RCA benefits in a general sense from NBC's ownership of broadcast stations, because of the profits which those stations earn. It is possible that whatever helps RCA may hurt its competitors. Surely this contingency alone, however, would not suffice

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[5] "Here the likelihood of substantial injury to Philco due to the competitive advertising advantages secured by RCA," stated the majority, "seems to us about as real as the circumstances held to give standing in *National Coal Ass'n* v. *FPC* * * *, and *Reade* v. *Ewing*. * * *" (Pet. 5a).

[6] "The Commission has found, with judicial approval, that the sole newspaper publishers in a community does have standing, upon a sufficient factual showing concerning the impact of television upon the advertising market in which both broadcast stations and newspapers operate, to protest the grant of construction permit for a first television service in the same community. *Ohio Valley Broadcasting Corp.*, 10 Pike & Fischer, Radio Regulation 152, affirmed on this point *sub nom. Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F.2d 511.

to confer standing to protest every NBC license renewal upon an entire industry not licensed by the Commission and without any stake in Commission action except insofar as that action is in some general sense a boon to one of their competitors.[7]

Apparently recognizing these considerations, the majority below did not attempt to place its holding on the simple ground that NBC's profits, made possible by operation under Commission licenses, help RCA and therefore may hurt RCA's competitors. Nor did it purport to find that such NBC practices as the incorporation of the RCA trade mark into station call letters and the announcement, at station breaks, that the station is "a service of RCA" substantially injure Philco simply because they are intended to, and presumably do, benefit RCA to some extent and in a general sense. The essence of the majority's holding lies in its statement that NBC's use of licensed facilities confers upon RCA " * * * a preferential economic advantage over the protestant." (Pet. 6a)

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[7] Cf., "It is inevitable that such regulations as these will affect in one way or another a large number of persons. In a sense they 'affect' the public at large for whose benefit they are promulgated. It is to be expected that this effect may be thought to be 'adverse' by a lesser, but still large, number of persons not engaged in making or selling the standardized product. It is, however, inconceivable that Congress intended to permit all persons who could show a remote and uncertain likelihood that the regulations would injuriously affect the market for their produce to file petitions to review merely because they decided that they had been, or might possibly be, put in danger of that." *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F.2d 116, 120 (C.A. 2)

The picture which called up by this language is that of a manufactu who corners a uniquely valuable source of supply or who obtains some other kind of substantial leverage upon his competitors. The basis for the court's conclusion that NBC's advertising of RCA falls into th category, however, is nowhere set forth in the opir on. There is no reason to assume, moreover, that uch advertising as is inherent in the NBC prac ices involved in this case is any better or more effective than any other kind of advertising, broadcast or otherwise, which is available to Philco. Moreover, as the dissenting judge pointed out (Pet. 7a), to the extent that NBC uses broadcast time to advertise RCA it sacrifices the opportunity to sell that time to another advertiser. To the extent that no immediate sacrifice of revenue is required, *e.g.*, by the incorporation of the RCA trade mark into a station's call letters, it is nonetheless true that such benefits cannot and do not come to RCA without a substantial investment of funds in the NBC stations which might well be used to achieve the same effects in another manner. The Commission's renewal of NBC's Philadelphia licenses places no artificial barrier in the way of Philco's investing its funds to obtain broadcast stations and thereafter using them in precisely the same manner as NBC uses its stations. The very television station involved in this case was owned by Philco from 1943 to 1953, and during that period Philco employed similar means to identify the station in the public mind as a Philco enterprise.

In sum, while the Commission is willing to assume that the NBC practices involved in this case may have some undetermined and indeterminable effect upon competition between RCA and Philco, it does not believe that a probability of substantial injury to Philco has been or can be demonstrated, without indulging in the most speculative judgments. Certainly where the "private attorney general" role under Section 309(e) is sought, in effect, for entire industries not subject to the Commission's regulatory control, some more substantial interest must be shown.

As petitioner has pointed out, a substantial number of Commission licensees engage in other non-licensed businesses or are under common control with firms in other industries (Pet. 10-11), and the practices of NBC which are at the root of this case are not unique or uncommon (Pet. 4, fn. 3; see also the motion and brief filed on behalf of the Gerity Broadcasting Company, pp. 1-2). The number of potential "private attorneys general" which the decision below creates at one stroke is substantial, to say the least. If the question raised related to the merits of Commission action, it might well be argued that the burdens involved in making relief available to so many parties were of less significance than the policies the statute is designed to implement. The issue, however, relates only to the selection, pursuant to Congressional mandate, of those eligible for a privileged and significant status in the administration of the Act. Thus, in the Commission's view, the holding of the court below misconceives the statutory

scheme and creates a precedent which can have a disruptive impact upon the Commission's administration of that scheme.

Respectfully submitted,

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